

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

November 19, 1997

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 96-3434-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**MARLOWE PALMORE,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgments and an order of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Marlowe Palmore has appealed from judgments convicting him upon guilty pleas of two counts of sexual assault of a child as a repeat offender in violation of §§ 939.62 and 948.02(1), STATS. He has also appealed from an order denying his motion to withdraw his guilty pleas based upon ineffective assistance of trial counsel. The trial court denied the

postconviction motion without holding an evidentiary hearing. We affirm the judgments and the order.

On appeal, Palmore contends that the trial court erred by denying his motion to withdraw his guilty plea without granting him an evidentiary hearing. A defendant is entitled to withdraw his guilty plea after sentencing only by showing, by clear and convincing evidence, that a manifest injustice has occurred. *See State v. Bentley*, 201 Wis.2d 303, 311, 548 N.W.2d 50, 54 (1996). The manifest injustice test is met if the defendant was denied effective assistance of counsel. *See id.*

The two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), applies to challenges to guilty pleas alleging ineffective assistance of counsel. *See Bentley*, 201 Wis.2d at 311-12, 548 N.W.2d at 54. Under that test, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. *See Strickland*, 466 U.S. at 687. To prove deficient performance, the defendant must show that counsel's performance fell below an objective standard of reasonableness. *See Hill v. Lockhart*, 474 U.S. 52, 57 (1985). The second inquiry focuses on whether counsel's performance affected the outcome of the plea process. *See id.* at 59. To satisfy the prejudice prong, the defendant must show that there is a reasonable probability that but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. *See Bentley*, 201 Wis.2d at 312, 548 N.W.2d at 54. To enable the trial court to meaningfully assess this claim, the defendant must allege that he or she would have pled differently and must support the allegation by objective factual assertions. *See id.* at 313, 548 N.W.2d at 54.

To prevail on a claim of ineffective assistance of counsel, a defendant must preserve trial counsel's testimony. *See State v. Machner*, 92

Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). However, a trial court, in the exercise of its discretion, may deny a postconviction motion alleging ineffective assistance without holding a hearing if the defendant fails to allege sufficient facts in the motion to raise a question of fact or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. See *Bentley*, 201 Wis.2d at 309-10, 548 N.W.2d at 53; *State v. Washington*, 176 Wis.2d 205, 215, 500 N.W.2d 331, 336 (Ct. App. 1993).

Based on these standards, we conclude that the trial court properly denied Palmore's motion without a hearing. In his motion, Palmore alleged that his trial counsel failed to properly investigate the case and to interview witnesses, including failing to contact his employer and coworkers to determine whether his employment provided an alibi defense. He also alleged that counsel failed to adequately communicate with him, meeting with him for only a few brief periods of fifteen minutes or less, and that counsel thus failed to afford himself the opportunity to hear Palmore's version of the facts. Palmore also contended that his trial counsel failed to explain the rights he would be waiving when he entered his pleas and failed to answer any questions he had regarding his waived rights.

The trial court properly determined that Palmore's motion presented only conclusory allegations and subjective opinions and failed to raise questions of fact entitling him to a hearing. A defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case. See *State v. Flynn*, 190 Wis.2d 31, 48, 527 N.W.2d 343, 349-50 (Ct. App. 1994). The defendant must base a challenge to his or her representation on more than speculation. See *id.* at 48, 527 N.W.2d at 350.

While Palmore alleged that trial counsel failed to conduct an adequate investigation, he did not identify who the alleged alibi witnesses might be or what they would have said if they had been contacted. Moreover, he did not allege that he even attempted to tell counsel that an alibi defense existed. An attorney's failure to investigate potential witnesses does not constitute ineffective assistance if the defendant himself did not inform counsel of the existence of such witnesses. See *State v. Hubanks*, 173 Wis.2d 1, 26-27, 496 N.W.2d 96, 105-06 (Ct. App. 1992). Absent such allegations, Palmore failed to provide sufficient facts to entitle him to a hearing on the issue of whether counsel performed deficiently and prejudicially in failing to investigate his case.

Similarly, Palmore's motion failed to set forth facts supporting his claim that counsel rendered ineffective assistance by failing to adequately communicate with him. While he alleges in a conclusory fashion that counsel's meetings with him were too brief, the length of the discussions alone is not determinative of whether counsel's representation was adequate. Here, Palmore alleged that he did not have time to communicate his questions or his version of the facts, but fails to explain what those questions or facts were, and thus fails to provide a basis to believe that counsel's contact with Palmore fell below an objective standard of reasonableness.

Palmore's motion also fails to allege that but for trial counsel's alleged deficiencies, he would have chosen to go to trial. Absent such an allegation and allegations of fact supporting a claim that he pled guilty only because of counsel's alleged deficiencies, Palmore's motion was insufficient to entitle him to a hearing or relief. See *Hill*, 474 U.S. at 60; *Bentley*, 201 Wis.2d at 316, 548 N.W.2d at 56.

Palmore's remaining claim is that he should have been permitted to withdraw his guilty pleas because counsel did not explain the constitutional rights he was waiving. Before accepting a guilty plea, a trial court must determine that the defendant possesses accurate information about the rights he or she is waiving and must ascertain that the defendant understands that information. See *State v. Bangert*, 131 Wis.2d 246, 270-72, 389 N.W.2d 12, 24-25 (1986). The trial court may establish the defendant's knowledge of his or her rights by personally advising the defendant of them at the plea hearing or by referring to some portion of the record or other evidence to determine whether he or she possesses adequate information. See *id.* at 268, 270-71, 389 N.W.2d at 24-25. A guilty plea questionnaire may be used to show that the defendant has been adequately informed of his or her rights. See *State v. Moederndorfer*, 141 Wis.2d 823, 827-28, 416 N.W.2d 627, 629 (Ct. App. 1987).

The plea colloquy in this case establishes that the trial court explained to Palmore each of the rights he was giving up by entering his guilty pleas and confirmed his understanding of each individual right. The record also establishes that Palmore executed a guilty plea questionnaire and waiver of rights form which listed each of the relevant rights and explained that he would be giving them up by pleading guilty. At the plea hearing, Palmore affirmatively represented that he had read and understood the form. Palmore therefore has failed to set forth any basis for concluding that his guilty pleas were entered without an adequate understanding of the constitutional rights he was waiving.

In closing, we also note that the trial court denied Palmore's motion on the alternative ground that it was untimely because it was filed more than sixty days after the sentencing transcript was sent to the prison or filed in the office of the clerk of the circuit court. Although Palmore's motion was properly denied by

the trial court on the ground that it failed to allege sufficiently specific facts, we point out that the sixty-day period for filing a postconviction motion runs from the date of service of the transcript on the defendant. *See* RULE 809.30(2)(g) and (h), STATS.

*By the Court.*—Judgments and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

